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No. 448

In the Supreme Court of the United States

OCTOBER TERM, 1930

AARON PRUSSIAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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The United States does not oppose the granting of the petition in this case, but suggests that the Court limit its review to the question stated below.

OPINIONS BELOW

The charge of the trial court to the jury appears at pages 124–128 of the Record. The opinion of the Circuit Court of Appeals (R. 148) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 7, 1930. (R. 151–152.) The petition for certiorari was filed September 11, 1930. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

We suggest that the Court limit its review to the following question:

Whether the indictment in the instant case, which charged the petitioner with forging by endorsement the name of the payee of a Government draft, states an offense under the Criminal Code.

The petitioner raises other questions which are considered below, but we submit that if petitioner is in a position to urge them here they are not of sufficient importance to warrant review by this Court.

STATUTES INVOLVED

Section 147 of the Criminal Code (U. S. C., Title 18, Sec. 261) provides in part as follows:

> The words "obligation or other security of the United States" shall be held to mean all * * * checks, or drafts for money drawn by or upon authorized officers of the United States * * *.

Section 148 of the Criminal Code (U. S. C., Title 18, Sec. 262) provides:

> Whoever, with intent to defraud, shall falsely make, forge, counterfeit, or alter any obligation or other security of the United States shall be fined not more than $5,000 and imprisoned not more than fifteen years.

Section 29 of the Criminal Code (U. S. C., Title 18, Sec. 73) provides in part as follows:

> Whoever shall falsely make, alter, forge, or counterfeit * * * any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving * * * from the United States, or any of their officers or agents, any sum of money * * * shall be fined not more than one thousand dollars and imprisoned not more than ten years.

STATEMENT

Petitioner, an attorney at law, was convicted on the first count of an indictment which charged him with forging by way of endorsement the name of the payee of a Government draft for $9,044.37, given as a refund of Federal income taxes. The payee was petitioner's client. (R. 9–11, 128.)

The face of the draft and also the reverse side thereof, with its several endorsements, are set forth verbatim in the body of the count.

The District Court sentenced petitioner to pay a fine of $200 and to serve five years in the penitentiary. (R. 129.) Its judgment was affirmed by the Circuit Court of Appeals for the Second Circuit. (R. 152.)

The evidence is sufficiently summarized for present purposes in the opinion of the Circuit Court of Appeals (R. 148–150), to which reference is made.

DISCUSSION

By a motion to dismiss made before trial, by a similar motion made after the close of the Govern-

ment's case, and by a motion in arrest of judgment, petitioner raised the question in the trial court whether an indictment which charges the forging of an endorsement upon a Government draft states an offense under the Criminal Code. (R. 15, 16, 81, 67–83, 129.) The trial court upheld the sufficiency of the indictment. Its ruling was approved by the Circuit Court of Appeals on the ground that the indictment stated an offense under Section 148 of the Criminal Code. The decision of the Circuit Court of Appeals is in accord with those of the Circuit Court of Appeals for the Fifth Circuit in *Hamil* v. *United States,* 298 Fed. 369, and the Circuit Court of Appeals for the Ninth Circuit in *Alvarado* v. *United States,* 9 F. (2d) 385. See also *DeLemos* v. *United States,* 91 Fed. 497 (C. C. A. 5th). But the Circuit Court of Appeals for the Eighth Circuit in *Gesell* v. *United States,* 1 F. (2d) 283, and *Lewis* v. *United States,* 8 F. (2d) 849, has held that Section 148 does not cover forgery of an endorsement upon a Government obligation. See also *White, Warden,* v. *Levine,* 40 F. (2d) 502 (C. C. A. 10th). Because of these conflicting decisions, we do not oppose a review on this point.

The indictment alleges that the forgery constituted a violation not only of Section 148 of the Criminal Code, *supra,* p. 2, but of Section 29 of that Code, *supra,* p. 3. (R. 12.) The application of Section 29 is also a doubtful question which remains in the case.

Other questions discussed in the petition for certiorari relate to petitioner's belief that he had authority to endorse his client's name on the refund check and to the intent of the parties in executing a power of attorney which gave the petitioner power to receive but *"not to endorse"* any checks given by the Government as a refund of the taxes petitioner was seeking to recover. Petitioner's evidence as to these issues was submitted to the jury in a charge which was as favorable to the petitioner as he could have expected (R. 124–127), and it would seem, as the Circuit Court of Appeals has said (R. 151), that the petitioner is not now in a position to reverse the adverse finding of the jury on these issues. In any event, we do not believe that these questions are of sufficient importance to warrant consideration by this Court. It is accordingly suggested that the Court limit its review to the question whether the indictment states an offense under the Criminal Code.

Respectfully submitted.

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